As the agency charged with administering the Communications Act, *see* 47 U.S.C. § 151, the FCC has interpreted § 332(c)(3)(A) on several occasions, often relying on the aforementioned legislative history.[2] The FCC has determined that a State's review of the rates charged by providers prior to implementation of the rates, where the review often occasioned delays of 30 days before new rate offerings could take effect, is "rate regulation" for purposes of § 332(c)(3)(A). *Pet. on Behalf of the State of Hawaii, Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7882 (1995). The Commission also has ruled that regulation of rates includes regulation of "rate levels and rate structures," such as whether to charge for calls in whole-minute increments and whether to charge for both incoming and outgoing calls, and that States are prohibited from prescribing "the rate elements for CMRS" and from "specify[ing] which among the CMRS services provided can be subject to charges by CMRS providers." *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999).

[2]The FCC has filed an amicus brief in this case asserting that Article 5 is preempted by § 332(c)(3)(A) because Article 5 is not a "generally applicable" state contract or consumer fraud law. Cellco urges us to accord "some" deference to the FCC's litigating position, citing the Supreme Court's grant of deference to an agency's amicus brief where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer v. Robbins*, 519 U.S. 452, 462 (1997). We note, however, that the FCC is in the midst of a rulemaking process designed to consider the merits of a rule similar to that espoused in the amicus brief. *See Truth-in-Billing & Billing Format*, 20 F.C.C.R. 6448, 6475-76 (2005) (second report and order, declaratory ruling, and second further notice of proposed rulemaking). The agency's position thus appears somewhat fluid, and perhaps short of "considered judgment." *See id.* at 6476 ("[W]e *tentatively* conclude that the line between the Commission's jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices.") (emphasis added). In any event, because our consideration of the FCC's previous adjudications and our interpretation of § 332(c)(3)(A) independently lead to our conclusion, we need not decide whether deference to the FCC's position in its brief is appropriate here.

In light of the legislative history classifying billing information, practices, and disputes as "other terms and conditions," however, the FCC has concluded that "state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332." *Id.* at 19908. The FCC later clarified that while § 332(c)(3) "does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims[,] . . . whether a specific damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of a particular case." *Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17022 (2000). In reaching that conclusion, the Commission noted that the "indirect and uncertain effects" of damage awards pursuant to state contract and tort law are not the same as the effects of direct rate regulation, and that although such awards may increase the costs of doing business, these costs "fall no more heavily on CMRS providers than on any other business." *Id.* at 17034-35 (internal quotation omitted).

Cellco focuses its preemption arguments primarily on subdivision 3 of the Minnesota statute. Subdivision 3 is entitled "Provider-initiated substantive change," and it mandates that providers

> must notify the customer in writing of any proposed substantive change in the contract between the provider and the customer 60 days before the change is proposed to take effect. The change only becomes effective if the customer opts in to the change by affirmatively accepting the change prior to the proposed effective date in writing or by oral authorization which is recorded by the provider and maintained for the duration of the contract period. If the customer does not affirmatively opt in to accept the proposed substantive change, then the original contract terms shall apply.

Minn. Stat. § 325F.695, subd. 3. A "substantive change" is defined in relevant part as "a modification to, or addition or deletion of, a term or condition in a contract that could result in an increase in the charge to the customer under that contract or that could result in an extension of the term of that contract." *Id.* § 325F.695, subd. 1(d).

We agree with the FCC that "fixing rates of . . . providers" is rate regulation, *see Pet. of Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1745 (1997), and we conclude that subdivision 3 of the Minnesota statute constitutes impermissible rate regulation preempted by federal law. The requirement of subdivision 3 that consumers consent to any substantive change prevents providers from raising rates for a period of time, and thus fixes the rates. The 60-day notification period created by subdivision 3 effectively freezes rates for 60 days when the provider notifies a customer of a proposed change in rates. The State's position – that Article 5 imposes only a "window within which the customer has to decide whether or not to accept a change proposed by the wireless provider," and that rate changes could go into effect immediately upon the consumer's consent – strikes us as inconsistent with the plain meaning of the text of the statute. Subdivision 3 requires that providers notify customers of "any proposed substantive change . . . 60 days before the change is proposed to take effect," and this change may take effect only if the customer "opts in" before "the proposed effective date." Minn. Stat. § 325F.695, subd. 3. A proposed change thus must include a proposed effective date, and modification of the "effective date" is not contemplated by the statute.

But even accepting the State's interpretation, under which rates may be changed as soon as a customer manifests assent, the statute still fixes rates for at least some customers to some degree. If even one customer declines to "opt in" to a provider's proposed rate increase, then the rate for that customer's service would be fixed for the term of the existing contract, often one or two years. Even assuming, *arguendo* (and contrary to our experience with human nature), that all consumers would willingly accept rate hikes when proposed, and thus "opt in" before the expiration of the 60-day period, subdivision 3 indisputably freezes rates for *some* period – at least until the consumer manifests acceptance. The statute thus requires providers to maintain rates different from those that would be charged if the providers were left to follow the terms of their existing contracts, which typically allow an adjustment of rates after reasonable notice of fewer than 60 days. (J.A. at 146, 149).

The State argues that subdivision 3 is a consumer protection measure that "further[s] the underlying traditional requirements of contract law as a way to protect consumer interests" by guarding consumers against unilateral contract changes. "Consumer protection matters," it notes, were among the matters listed by the House Budget Committee as illustrative of "terms and conditions" that would be open to state regulation under § 332(c)(3)(A). H.R. Rep. No. 103-11, at 261. We find this argument overbroad, and we are not persuaded. Any measure that benefits consumers, including legislation that restricts rate increases, can be said in some sense to serve as a "consumer protection measure," but a benefit to consumers, standing alone, is plainly not sufficient to place a state regulation on the permissible side of the federal/state regulatory line drawn by § 332(c)(3)(A). To avoid subsuming the regulation of rates within the governance of "terms and conditions," the meaning of "consumer protection" in this context must exclude regulatory measures, such as Article 5, that directly impact the rates charged by providers.

Subdivision 3, moreover, goes beyond traditional requirements of contract law, and thus falls outside the scope of the "neutral application of state contractual or consumer fraud laws," which the FCC has said is permissible state regulation of wireless providers. This statute effectively voids the terms of contracts currently used by providers in one industry, and substitutes by statute a different contractual arrangement. The existing contracts exemplify an "opt-out" structure – that is, they permit the providers to effect rate increases upon reasonable notice to the customer, whose continued use of the service binds him to the new rate unless he affirmatively declines to accept the changes. (J.A. at 149). Subdivision 3 mandates an "opt-in" contract structure: the provider cannot increase rates unless the customer affirmatively accepts the changes. The State contends that the current structure used by the providers renders the contracts "illusory," because it permits the providers "unilateral[ly]" to "change the contract's terms," (Appellee's Br. at 33), but we are not convinced. There is no indication that "opt-out" contracts of the sort used by the providers are considered illusory under Minnesota's consumer protection statutes or its common law, and in fact, such contracts are generally accepted as legal and binding. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173-74 (5th Cir. 2004); *cf. Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (declaring enforceable the acceptance, by continued performance, of modification in a unilateral contract for employment). Subdivision 3, therefore, cannot be deemed a "neutral application of state contractual or consumer fraud laws" that avoids the preemptive force of the federal statute. *See Wireless Consumers Alliance*, 15 F.C.C.R. at 17025-06. A waiting period on any proposed rate changes, whether it be for 60 days or some shorter period pending a customer's decision to "opt in," has a clear and direct effect on rates. We thus conclude that subdivision 3 effectively regulates rates, and is preempted by § 332(c)(3)(A).

III.

There remains the question whether the other subdivisions of Article 5 may be enforced independent of subdivision 3. Whether one provision of a statute is severable from the remainder is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). In Minnesota, the remaining provisions of a statute shall be valid, "unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one," or "unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." Minn. Stat. § 645.20. To give these clauses independent meaning, we understand the former clause to forbid severance in cases where the remaining provisions are *not* incomplete or incapable of being executed, but where the interrelationship of the void and non-void provisions nonetheless precludes the presumption that the legislature would have enacted only the latter provision. *See Archer Daniels Midland Co. v. State*, 315 N.W.2d 597, 600 (Minn. 1982) (concluding remaining provisions of statute, standing alone, were not severable, where legislative intent to prefer limited application of statute was "not at all clear."); *Bang v. Chase*, 442 F. Supp. 758, 771 (D. Minn. 1977) (three-judge court).

We believe that the remaining subdivisions of Article 5 – a definitional section, a provision requiring wireless providers to furnish customers with a copy of written contracts, and a subdivision regulating "customer-initiated changes" – are connected with and dependent upon subdivision 3. The legislative history shows that subdivision 3 was the motivating force behind Article 5. The principal Senate sponsor, for example, explained that "the reason for the genesis of this bill . . . is people in our area were contacting our local representative . . . and telling him that their contracts were being changed without their consent." (J.A. 361).

The three substantive subdivisions were then conceived together as a unified effort to regulate certain practices of wireless telecommunications service providers. The requirement of subdivision 2 that providers furnish customers with a written copy of *existing* contracts serves as foundation for the later subdivisions, which require disclosure of proposed changes to those existing contracts. As the principal House sponsor explained, "keep in mind we are just doing two things: One) we want to verify in the records that the customer did agree to a contract in the first place and two) if a unilateral change is made in that contract by the provider, the customer is off the hook." (J.A. 384). Subdivisions 3 and 4 work in tandem as requirements for consent and disclosure, depending on whether a change in contractual terms is "provider-initiated" or "customer-initiated."

The legislature recognized that the regulatory provisions would place a burden on the industry, and potentially would raise costs for consumers. The principal House sponsor remarked that depending on how the legislation was crafted, "[i]t could turn into something that ends up costing everybody more money and it does kind of complicate the whole process." (J.A. 383). The legislature ultimately concluded that the expected benefits to the consumer outweighed concerns about costs to providers and the system, but it enacted a two-year sunset provision, so, as one representative put it, "we can all reevaluate whether or not that is cumbersome or not, or if it works as well as many think it may work." (J.A. 396; *see also* J.A. 387). "Provider-initiated" substantive changes were central to the development of Article 5, and we find it difficult to presume that the legislature would have enacted the two remaining substantive provisions standing alone, with their attendant costs to the system, if it had been precluded at the outset from regulating in the area of principal concern and perceived benefit to consumers – that is, provider-initiated changes. It also bears noting that one senator active in the legislative process surrounding Article 5 commented on the "complexities of all the moving pieces" in the proposed legislation, and on the need to ensure that each of the "multiple moving pieces" fit together in a final bill. (J.A. 394).

We conclude, therefore, that subdivisions 1, 2, and 4 are not severable from subdivision 3, and that Article 5 should be enjoined in its entirety. The remaining articles of House File No. 2151 operate independently, and they remain valid. This conclusion makes it unnecessary for us to consider Cellco's contentions that subdivisions 1, 2 and 4 of Article 5 are unconstitutionally vague, because the subdivisions fail to define such important statutory terms as "customer" and "disclosure," and because the statute defines "substantive change" indefinitely as any modification of contract that "could result" in an increase in charges. *See Planned Parenthood of Idaho v. Wasden*, 378 F.3d 908, 937 (9th Cir. 2004). If and when the legislature revisits this area, it will be in a position to consider whether more precise definitions are appropriate.

*   *   *

For the foregoing reasons, we reverse the district court's partial denial of Cellco's request for a preliminary injunction and remand for entry of a permanent injunction against enforcement of Article 5.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

COPY

CINGULAR WIRELESS LLC, RAM COMMUNICATIONS GROUP LLC, TRITEL COMMUNICATIONS LLC, and NEW CINGULAR WIRELESS PCS, LLC, all d/b/a CINGULAR WIRELESS; and

CELLCO PARTNERSHIP, GTE WIRELESS OF THE MIDWEST INCORPORATED, KENTUCKY RSA NO. 1 PARTNERSHIP, NEW PAR, and VERIZON WIRELESS TENNESSEE PARTNERSHIP, all d/b/a VERIZON WIRELESS; and

SPRINT SPECTRUM, L.P., WIRELESSCO, L.P., SPRINTCOM, INC., and NEXTEL WEST CORPORATION, all d/b/a SPRINT; and

VOICESTREAM COLUMBUS, INC. and POWERTEL MEMPHIS, INC., both d/b/a T-MOBILE; and

NPCR, INC.

Plaintiffs,

v.

ROBBIE RUDOLPH, Secretary of the Finance and Administration Cabinet, Commonwealth of Kentucky, in his official capacity; and

MARK TREESH, Commissioner of the Department of Revenue, Commonwealth of Kentucky, in his official capacity

Defendants.

Eastern District of Kentucky
FILED

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AT FRANKFORT
LESLIE G WHITMER
CLERK U S DISTRICT COURT

Civil Action

No. 3:05-CV-81 KKC

Serve: Hon. Gregory D. Stumbo, Attorney General for the Commonwealth of Kentucky
Office of the Attorney General
The Capitol, Suite 118
700 Capitol Avenue
Frankfort, Kentucky 40601-3449

Serve: Robbie Rudolph, Secretary Finance and Administration Cabinet
Commonwealth of Kentucky
Office of the Secretary
Room 383, Capitol Annex
Frankfort, KY 40601

Serve: Mark Treesh, Commissioner
Department of Revenue
Commonwealth of Kentucky
200 Fair Oaks Lane
Frankfort, KY 40620

COMPLAINT

Nature of the Action

1. Plaintiffs, five of the nation's largest wireless telephone service providers, bring this action to enjoin enforcement of a recently-enacted Kentucky statute that is expressly preempted by federal law.

2. On March 18, 2005, Kentucky House Bill 272 ("House Bill 272") was enacted. Among other provisions, Section 96 of House Bill 272 imposes a new 1.3% gross revenues tax on wireless service providers, including Plaintiffs, effective January 1, 2006. Plaintiffs do not challenge the imposition of the gross revenues tax in any respect. Rather, this action relates only to one provision contained within Section 96 of House Bill 272, which prohibits Plaintiffs from "directly collecting" the newly-enacted gross revenues tax from their subscribers or "separately stat[ing] the tax on the bill to the purchaser." In other words, the provision at issue makes it illegal to pass on the cost of the new tax in the form of a separate line item on customers' bills.[1] Absent relief from this Court, this "muzzle provision" will go into effect on January 1, 2006.

3. Enforcement of the muzzle provision should be enjoined because the provision regulates wireless carriers' rates, and such regulation is expressly

preempted by federal law. Section 332(c)(3)(A) of the Communications Act provides that "[n]o state or local government shall have ***any*** authority to regulate the . . . rates charged by any commercial mobile service" – that is, by any wireless carrier. 47 U.S.C. § 332(c)(3)(A) (emphasis added). Further, in an order dated March 18, 2005, the Federal Communications Commission ("FCC"), the federal agency charged with regulation of wireless providers under the Communications Act, confirmed "that state regulations requiring or prohibiting . . . the use of line items for [wireless telephone services] constitute rate regulation and are preempted under section 332(c)(3)(A)." *In re Truth-in-Billing and Billing Format, National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCCR 6448, 6462 (¶ 30) (2005) [hereinafter *Second Truth-in-Billing Order*].[2] The FCC's construction of section 332(c)(3)(a) must be granted substantial deference in this court, and Kentucky's muzzle provision simply cannot stand in the face of section 332(c)(3)(A) and the FCC's express finding that such state laws regulate wireless carriers' rates within the meaning of the statute.

(..continued)
[1] A true and correct copy of House Bill 272, 2005 Ky. Acts Ch. 168, Section 96, is attached hereto as Exhibit A.

[2] A true and correct copy of this Order is attached as Exhibit B.

4. The muzzle provision is preempted for a second reason: it conflicts with and frustrates bedrock federal policies that apply to wireless service (also known as "commercial mobile radio service" or "CMRS"). As the FCC itself determined: "Efforts by individual states to regulate CMRS carriers' rates through line item requirements . . . would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS. . . . [T]here is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." *Second Truth-in-Billing Order*, 20 FCCR at 6467 (¶ 35).

5. Apart from the preemptive effect of federal law, enforcement of the muzzle provision should be enjoined for other reasons:

(a) by prohibiting Plaintiffs from separately stating the tax on their bills to their customers, the muzzle provision deprives Plaintiffs of their constitutional right to free speech in violation of the First and Fourteenth Amendments of U.S. Constitution;

(b) by shifting the economic cost of the new gross revenues tax from Kentucky customers to customers in other states, the muzzle provision unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution; and

(c) the muzzle provision violates Plaintiffs' civil rights as guaranteed by 42 U.S.C. §1983.

6. Plaintiffs seek declaratory and injunctive relief to strike only the muzzle provision imposed by House Bill 272. This Provision is expressly severable from the rest of House Bill 272. ***This action does not seek to enjoin, restrain, or suspend the assessment, levy, or collection of any tax.***

Parties

7. Cingular Wireless LLC, RAM Communications Group LLC, Tritel Communications LLC, and New Cingular Wireless PCS, LLC are all Delaware limited liability companies. Each of the entities named in this paragraph (collectively, "Cingular") does business in Kentucky under the name Cingular.

8. Cellco Partnership is a Delaware general partnership; GTE Wireless of the Midwest Incorporated is an Indiana corporation; Kentucky RSA No. 1 Partnership is a Delaware general partnership; New Par is a Delaware general partnership; and Verizon Wireless Tennessee Partnership is a Delaware limited partnership. Each of the entities named in this paragraph (collectively "Verizon Wireless") does business in Kentucky under the name Verizon Wireless.

9. Sprint Spectrum, L.P. and WirelessCo, L.P. are Delaware limited partnerships. SprintCom, Inc. is a Kansas corporation. Nextel West Corporation is a Delaware corporation. Each of the entities named in this paragraph (collectively "Sprint") does business in Kentucky under the name Sprint, Sprint PCS, or Sprint Nextel.

10. Voicestream Columbus, Inc. and Powertel Memphis, Inc. (together "T-Mobile") are Delaware corporations that do business in Kentucky under the name T-Mobile.

11. NPCR, Inc. is a Delaware corporation that does business in Kentucky under the name Nextel Partners.

12. Defendant Robbie Rudolph is Secretary of the Finance and Administration Cabinet of the Commonwealth of Kentucky, and, in that capacity is responsible for the execution and enforcement of the tax laws of the Commonwealth, including House Bill 272 upon effect. Secretary Rudolph is sued, not individually, but in his official capacity for declaratory and injunctive relief only.

13. Defendant Mark Treesh is Commissioner of the Department of Revenue of the Commonwealth of Kentucky, and, in that capacity, is responsible for the execution and enforcement of the tax laws of the Commonwealth, including

House Bill 272 upon effect. Commissioner Treesh is sued, not individually, but in his official capacity for declaratory and injunctive relief only.

Jurisdiction and Venue

14. This action arises under the Constitution and laws of the United States, specifically Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 151 *et seq.*, and the Commerce and Supremacy Clauses and First and Fourteenth Amendments of the United States Constitution. Therefore, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.

15. This action also arises under 42 U.S.C. § 1983 to enjoin the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution and laws of the United States. Therefore, this Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1343.

16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims asserted herein occurred in this judicial district and because the Defendants maintain offices and conduct their official business in this judicial district.

Common Allegations

Federal Regulation of CMRS Rates and Line Item Charges

17. Congress enacted the Communications Act of 1934 to create a comprehensive federal regulatory framework for radio communications "so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service." 47 U.S.C. § 151. Pursuant to the Communications Act, the FCC exercises "federal primacy" over the competitive market structure for cellular service in order to avoid "state and local regulations [that] might conflict with and thereby frustrate" the federal goal of nationwide compatibility for CMRS. *In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C.2d 469, 503, 505 ¶¶ 79, 82 (1981). Congress has mandated, and the FCC has implemented, a federal regulatory framework for CMRS that furthers a number of important federal policies and objectives, including: (a) ensuring nationwide uniformity in rates, terms and conditions of service; (b) encouraging investment in and rapid deployment of new wireless technologies by minimizing regulatory burdens; (c) ensuring a regulatory framework that permits the development of national enterprises by mandating regulatory parity across state lines; and (d) prohibiting discrimination in rates,

terms and conditions of service among customers. *See generally* 47 U.S.C. §§ 151, 161, 201, 202, 301, 332. To promote these objectives, the Communications Act exempts CMRS from the system of dual state and federal regulation that governs traditional land-based, or wireline, telephone services. 47 U.S.C. § 152(b).

18. In 1993, Congress amended Section 332 of the Communications Act to expressly prohibit the states from regulating the rates charged by wireless carriers. Section 332(c)(3) of the Act, entitled "State Preemption," provides in pertinent part that "[n]o State or local government shall have ***any*** authority to regulate the entry of or the rates charged by" a CMRS provider. 47 U.S.C. § 332(c)(3)(A) (emphasis added). "As the legislative history of [these amendments] makes plain, Congress intended those building blocks to establish a national regulatory policy for CMRS, . . . not a policy that is balkanized state-by-state." *In the Matter of Petition of Arizona Corporation Commission, To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services And In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services,* 10 FCCR 7824, 7828 (¶ 15) (1995). The FCC has interpreted Section 332(c)(3)(A) as broadly preempting not only state laws that purport to set CMRS rate levels, but also state laws that regulate CMRS rate structures and rate elements. *In the Matter of Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling*

Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, 14 FCCR 19898, 19907 (¶ 20) (1999).

19. Indeed, the FCC recently confirmed that precisely the type of regulation at issue here – state laws prohibiting the use of bill line items – "constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act." *Second Truth-in-Billing Order*, 20 FCCR at 6462 (¶ 30). Thus, the FCC specifically held that Section 332(c)(3)(A)'s express prohibition against state regulation of wireless rates preempts *any* state law forbidding the use of line item charges by CMRS providers to recover the costs of gross receipts taxes. *Id.* at 6463-6464 (¶ 31) & n.87.

CMRS Providers' Use of Line-Item Charges

20. Plaintiffs conduct their business operations on an interstate basis. Their services are designed, marketed, advertised, sold and priced without regard to state borders. Plaintiffs, either themselves or in conjunction with their affiliates, offer service on a "nationwide" basis in order to generate economies of scale and to enhance their ability to offer nationwide service and pricing. Plaintiffs each offer one or more national single-rate pricing plans that allow customers to purchase a quantity of minutes of use on a nationwide or nearly nationwide network at the same rate.

21. Plaintiffs bill the vast majority of their customers on a monthly basis by way of monthly billing statements. In addition to listing Plaintiffs' charges for CMRS service and features, the monthly billing statements include a number of separate line-item charges to recover directly certain taxes and fees imposed on CMRS providers by state and local governments.

22. The use of separate line item charges to directly recover the state and local taxes and fees allows Plaintiffs and other CMRS providers to maintain service plan pricing that applies across different tax jurisdictions, ensures that customers in one jurisdiction do not bear the burden of taxes imposed by another jurisdiction, and informs Plaintiffs' customers what portion of their total charges is attributable to the itemized state and local taxes and fees.

Enactment of the Muzzle Provision

23. On March 18, 2005, Governor Fletcher signed Kentucky House Bill 272 into law. House Bill 272 is a comprehensive tax reform bill that makes substantial changes to Kentucky's tax system, which is codified at Kentucky Revised Statute § 131, *et seq.* ("the Tax Code"). Chapter 136 of the Tax Code, codified at KRS § 136 *et seq.*, governs taxation of certain corporations and utilities. Included in the major reform of House Bill 272 is the addition of Sections 88-118, which impose an excise tax on the gross revenues of providers of communications

services and multichannel video programming services (i.e., cable television and direct broadcast satellite).

24. Section 96 imposes a tax of "one and three-tenths percent (1.3%) of the gross revenues received for the provision of communications services billed on or after January 1, 2006" on CMRS providers and providers of other communications services. Paragraph 3 of Section 96 also adds the muzzle provision, which states "[t]he provider shall not collect the tax directly from the purchaser or separately state the tax on the bill to the purchaser."

25. Section 164 of House Bill 272 expressly provides that: "If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable."

Effect of the Muzzle Provision on Plaintiffs' Rate Structures

26. Plaintiffs serve about 80% of the approximately two million CMRS customers in Kentucky.

27. If the muzzle provision is allowed to stand, Plaintiffs will be faced with a choice between (a) forcing non-Kentucky customers to bear the burden of the new gross receipts tax in order to preserve the industry's national rate plan

model, or (b) eliminating the national rate plan model by raising basic monthly service rates for only Kentucky customers.

28. To preserve the national rate plan model, Plaintiffs would have to recover the cost of Kentucky's new gross revenues tax in their monthly service rates across the nation, thus forcing non-Kentucky customers to bear almost all of the cost of the new tax, while receiving none of the benefits from the tax revenues. Other states would have an incentive to pass similar muzzle provisions in order to reap the windfall of tax revenues that are ultimately collected from residents of another state.

29. If Plaintiffs instead raise the basic service rates of only Kentucky customers, Plaintiffs – and their customers – will lose the advantages of nationwide price plans, and Plaintiffs will be forced to develop Kentucky-specific versions of their many national and regional service offerings. Implementation of an increase in Plaintiffs' rate plans just in Kentucky to recover the cost of the new gross revenues tax would reduce economies of scale produced by uniform national pricing and require (by way of illustration) adjustment of billing and financial reporting systems, revision of local advertising, marketing and sales materials, and supplemental training of sales and customer care personnel who deal with customers in Kentucky as well as in surrounding areas that would be exposed to the Kentucky-specific advertising, marketing, and sales materials.

Irreparable Harm

30. The muzzle provision, if left in place, will cause Plaintiffs immediate and irreparable harm. First, it will deprive Plaintiffs a means of communicating to their Kentucky customers the impact of state taxes.

31. Second, the muzzle provision will deprive Plaintiffs of the uniform, market-based federal regulatory scheme mandated by Congress and required by the Communications Act as well as by the Supremacy and Commerce Clauses of the Constitution.

32. Third, for Plaintiffs to recover the costs of the new gross revenues tax from Kentucky customers while complying with the Muzzle provision, Plaintiffs will have to make significant changes to their price plans, billing systems, marketing materials, sales scripts, advertising campaigns, training programs, and other aspects of their operations. These changes would entail significant costs, both due to the direct costs of implementation and due to the loss of economies of scale caused by tailoring national or regional systems to accommodate Kentucky's new billing requirements. Unlike parties harmed by the actions of private defendants, Plaintiffs will have no recourse against the state to recover these losses even if they prevail in this litigation.

33. As a practical matter, Plaintiffs cannot avoid the immediate, irreparable economic losses occasioned by the muzzle provision by deferring

recovery of the cost of Kentucky's gross revenues tax pending conclusion of this litigation. Any attempt to backbill customers for the accumulated tax expense would be ineffective or, at a minimum, would result in a loss of goodwill.

34. Indeed, any attempt to collect the additional tax through increases of monthly subscription rates (whether nationwide or limited to Kentucky customers) will cause a loss of goodwill. Loss of customer goodwill, particularly in a competitive environment such as the CMRS market, is irreparable.

Threat of Imminent Enforcement

35. After enactment of House Bill 272, Plaintiffs contacted the Kentucky Department of Revenue ("Department") (a) to inform them of the FCC's decision confirming that federal law preempts state laws prohibiting the use of line items to recover gross revenues taxes, and (b) to request a meeting to discuss the legal issues raised by the muzzle provision. On or about August 10, 2005, representatives of Plaintiffs and the Department met for that purpose.

36. At the August 10 meeting, Plaintiffs explained that federal law clearly preempted states from prohibiting wireless carriers either from collecting the tax from customers or from separately stating the amount of the tax on customers' bills. Plaintiffs then requested written acknowledgement from the Department that federal law governs this area with respect to wireless carriers. The Department took this request under advisement and requested a teleconference with Plaintiffs'

regulatory attorneys to discuss the FCC's *Second Truth-in-Billing Order*. The teleconference was held on August 17, 2005.

37. On or about September 26, 2005, Verizon Wireless received a voice mail message from the Department, which indicated that, having considered the CMRS providers' position, the Department would nevertheless administer the muzzle provision as written. On or about October 18, 2005, Verizon Wireless sent a letter to the Department confirming its understanding of the voice mail message and providing notice that the Department's position required Verizon Wireless to pursue other options with respect to the muzzle provision.[3]

CLAIMS FOR RELIEF

Count I

(Preemption under the Communications Act and the Supremacy Clause)

38. Plaintiffs incorporate herein by reference the allegations set forth in the preceding paragraphs.

39. The muzzle provision is expressly preempted by federal law because it regulates the "rates charged" by CMRS providers, in violation of Section 332(c)(3)(A) of the Communications Act.

40. In addition, the muzzle provision is impliedly preempted by federal law because it thwarts congressional telecommunications policies and objectives